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Divorce - Parent and Child - North Dakota's Interprertation of the Interplay between the PKPA and the UCCJA

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DIVORCE — PARENT AND CHILD — NORTH DAKOTA'S INTERPRETATION OF THE INTERPLAY BETWEEN THE PKPA* AND THE UCCJA*

In September of 1981, a North Dakota district court granted Earl and Renae Dennis a divorce, giving Renae custody of their children.[1] One month later Renae and the children moved to Iowa, where they continued to reside.[2] In July 1984, Earl filed a request with the district court to modify the visitation provisions of the original decree.[3] The district court denied Earl's modification request after determining that North Dakota no longer had subject matter jurisdiction.[4] The district court based its ruling on the fact that Iowa, not North Dakota, was the children's home state.[5] Earl

*For purposes of this case comment, the initials PKPA will denote the Parental Kidnapping Prevention Act and the initials UCCJA will denote the Uniform Child Custody Jurisdiction Act. *See* 28 U.S.C. § 1738A (1982) (PKPA); UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1968).

1. Dennis v. Dennis, 366 N.W.2d 474, 475 (N.D. 1985). The original divorce decree gave Earl reasonable visitation rights. *Id.*

2. *Id.* At the time the original divorce was granted, the court was aware of Renae's intention to move to Iowa and provided for alternative visitation provisions to become effective when Renae moved. *See id.* These alternative visitation provisions included a ten day summer visitation with Earl, provided he paid the children's transportation costs. Brief for Appellant at 2, Dennis v. Dennis, 366 N.W.2d 474 (N.D. 1985).

3. 366 N.W.2d at 475. Earl asserted that North Dakota had jurisdiction to modify the visitation provisions because he was a "contestant" under the full faith and credit provisions of the PKPA, and because he continued to reside in that state. *Id.*; *see* 28 U.S.C. § 1738A(d) (1982) (court making an initial determination retains jurisdiction if it has jurisdiction under state law and such state remains the residence of the child or any contestant). For the text of the full faith and credit provisions of the PKPA, see *infra* note 34.

Earl requested modification of the custody decree to grant him visitations of three months in the summer, two weeks at Christmas, and one week at Easter. Brief for Appellant at 2. The visitations were to include contact with Earl's brothers, sisters, and grandmother. *Id.* In addition, Earl requested that Renae pay one-half of the transportation costs, that his child support payments be cut in half for the time the children visit him, and that his present wife be entitled to inherit his visitation rights. *Id.*

4. 366 N.W.2d at 475.

5. *Id.* at 475, 477. The district court based its determination that North Dakota no longer had subject matter jurisdiction upon § 14-14-03(1)(a) of the North Dakota Century Code. *Id.* at 476-77; *see* N.D. CENT. CODE § 14-14-03(1)(a) (1981). Section 14-14-03(1)(a) provides as follows:

> A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial decree or modification decree if:

appealed the district court's decision and contended that the Parental Kidnapping Prevention Act (PKPA)[6] required that North Dakota assume jurisdiction.[7] The North Dakota Supreme Court reversed the district court and *held* that a court may modify its initial child custody decrees though the children involved have acquired a new home state.[8] *Dennis v. Dennis,* 366 N.W.2d 474 (N.D. 1985).

Prior to the adoption of uniform legislation, state courts applied varying standards to determine whether they had jurisdiction to modify custody decrees.[9] These courts tended to assume jurisdiction to modify decrees on whatever grounds

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> This state (1) is the home state of the child at the time of commencement of the proceeding, or (2) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state. . . .

Id.; see also U.C.C.J.A. § 3(a)(1) (1968). "Home state" is defined in § 14-14-02(5) as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months. . . . Periods of temporary absence of any of the named persons are counted as part of the six-month or other period." N.D. CENT. CODE § 14-14-02(5) (1981); *see also* U.C.C.J.A. § 2(5) (1968); 28 U.S.C. § 1738A(4) (1982) (PKPA definition of "home state").

6. 28 U.S.C. § 1738A (1982).

7. 366 N.W.2d at 475. Earl contended that his continued residency in North Dakota required the state to exert continuing jurisdiction over the custody modification. *Id.* at 475, 476; *see* 28 U.S.C. § 1738A(d) (1982) (court making an initial custody determination retains jurisdiction if it has jurisdiction under state law and that state remains the residence of the child or any contestant).

8. 366 N.W.2d at 477-78 (by implication). Although the court disagreed as to the proper methodology to be employed in resolving the issue in *Dennis,* all justices agreed that North Dakota did not automatically lose jurisdiction once Iowa became the home state of the children. *Id.* For a discussion of the differences among the justices of the court in *Dennis,* see *infra* notes 87-106 and accompanying text.

9. *See* Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement,* 66 MINN. L. REV. 711, 719 (1982). Prior to adoption of the UCCJA and the PKPA, the three most common bases for assumption of jurisdiction in child custody cases were (1) domicile of the child, (2) the child's physical presence, and (3) personal jurisdiction over the parties. *Id. See generally* Ruby, *Modification of an Out of State Child Custody Decree Under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act,* 16 U. RICH. L. REV. 773, 774-77 (1982).

The term "modify," as used in this comment, refers to any change in the initial custody order regardless of which court or state makes the change. *See* 28 U.S.C. § 1738A(b)(5) (1982) (PKPA definition of "modify"); U.C.C.J.A. § 2(7) (1968) (UCCJA definition of "modify"); N.D. CENT. CODE § 14-14-02(7) (1981) (North Dakota codification of UCCJA definition).

Courts can modify custody decrees only if modification is called for by a change in circumstances after the decree was rendered. Kottsick v. Carlson, 241 N.W.2d 842, 848 (N.D. 1976). There are no fixed standards concerning which changes in circumstances justify modification of a child custody decree. *See* Gonyea v. Gonyea, 232 Or. 367, ____, 375 P.2d 808, 810 (1962) (the amount of change necessary to justify a modification of a child custody decree will be determined on a case-by-case basis). Factors that are frequently present in modification proceedings include the remarriage of one or both parents, failure to comply with the initial decree, the act of a custodial parent turning a child against the noncustodial parent, a change in a parent's mental health, and a change in the child's preference as to custodial parent. 24 AM. JUR. 2D *Divorce and Separation* § 1012 (1985).

When modification is requested, however, courts are guided by the generally accepted principle that the welfare and best interests of the child are of primary concern. *See, e.g.,* Bryant v. Bryant, 102 N.W.2d 800 (1960). In *Bryant,* the father sought modification of a child custody decree because his daughters' preference as to custodial parent had changed. *Id.* at 804. Though recognizing that the daughters' desire to live with their father was a change of circumstances, the North Dakota Supreme

appeared reasonable.[10] This flexibility of the courts in assuming jurisdiction, coupled with a recognized exception to the rule of full faith and credit applicable in child custody cases,[11] encouraged parties involved in custody disputes to engage in the following: (1) seizing, concealing, and removing children who were subjects of custody disputes and transporting them to other states;[12] (2) disregarding court orders;[13] (3) relitigating custody in other states;[14] and (4) obtaining conflicting decrees in different states.[15]

Court found that modification of the decree would not be in the best interests of the children. *Id.* at 805-06. The court therefore refused to modify the custody decree, finding that the rights and welfare of the children were paramount to the rights of the parent regarding custody. *Id.* at 804, 806.

10. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 320 (1968). Clark states that the confusion involved in determining jurisdiction to modify child custody decrees evolves from a court's reversal of the normal order of deciding cases. *Id.* In most cases, a court first determines whether it has jurisdiction to hear the case and then proceeds to decide the question. *Id.* Clark argues that in custody cases, a strong interest in the child's welfare leads courts to resolve the substantive issue of modification before deciding whether they have subject matter jurisdiction. *Id.*

11. *See* U.S. CONST. art. IV, § 1. The full faith and credit clause of the United States Constitution provides as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* Prior to the enactment of the PKPA, it was generally agreed that the full faith and credit clause did not apply to child custody decrees. *See* Ruby, *supra* note 9, at 774; *see also* Ford v. Ford, 371 U.S. 187 (1962). In *Ford,* the United State Supreme Court allowed a South Carolina court to modify a Virginia child custody decree. *Id.* at 194. In making its determination, the Court reasoned that "[t]he Full Faith and Credit Clause, if applicable to a custody decree, would require South Carolina to recognize the Virginia order as binding only if a Virginia court would be bound by it." *Id.* at 192. The Court concluded that a Virginia court would not be bound by its custody decree since Virginia law allows modification of such decrees if circumstances have changed. *See id.* at 192-94. Because a Virginia court would not be bound by its own custody decree, the Court held that South Carolina was not precluded from modifying the decree by the full faith and credit clause. *Id.* at 193-94.

Pursuant to its authority under the full faith and credit clause, however, Congress has limited the ability of a state to modify a child custody decree rendered in another state by enacting the PKPA. *See* Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6 to 10, 94 Stat. 3566, 3568-69 (1980) (codified at 28 U.S.C. § 1738A (1982)). For a discussion of the PKPA and its limits on the ability of a state to obtain jurisdiction to modify a child custody decree, see *infra* notes 34-45 and accompanying text.

12. *See, e.g.,* Dobyns v. Dobyns, 650 S.W.2d 701 (Mo. Ct. App. 1983). In *Dobyns,* the mother obtained a divorce decree in Nevada which awarded her custody of her son. *Id.* at 703. The father removed their son to Missouri before the divorce was finalized, and the mother was unable to locate the child for approximately four years. *Id.* at 703. When her son was finally located in Missouri, the mother sought to register the decree in that state and have it enforced. *Id.* A Missouri trial court determined that Nevada did not have jurisdiction to render the initial decree, and proceeded to hold an original custody hearing. *Id.* at 707.

13. *See, e.g.,* O'Daniel v. Walker, 686 S.W.2d 805 (Ark. Ct. App. 1985). In *Walker* the mother refused to comply with an Arkansas court order to deliver custody of her children to their father. *Id.* at 806. Instead, she moved to Tennessee and initiated an action for temporary custody. *Id.* The Arkansas court found her in contempt for violation of a valid, final Arkansas order. *Id.* On appeal, the mother claimed that the Arkansas custody decree was invalid because the Arkansas court lacked subject matter jurisdiction. *Id.* The Arkansas Court of Appeals held that the trial court had continuing jurisdiction, and the contempt conviction was affirmed. *Id.* at 807.

14. *See, e.g.,* Bergstrom v. Bergstrom, 296 N.W.2d 490 (N.D. 1980). In *Bergstrom,* the Superior Court of the District of Columbia had placed the custody of the Bergstrom's daughter with the mother during the school year and with the father during the summer. *Id.* Thereafter, the father moved to North Dakota and requested that the Burleigh County District Court assume jurisdiction to determine child custody and visitation rights. *Id.* The Supreme Court of North Dakota found that the custody decree could be modified by a North Dakota court because such modification was in the child's present best interest. *Id.* at 495.

15. *See, e.g.,* Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984). In *Flood,* a North Dakota court granted the divorce of Betty Flood and Gerald Braaten. *Id.* at 305. After being awarded custody of the children, the mother moved to New Jersey. *Id.* The father obtained a modification of the custody decree in North Dakota, awarding him custody of the children. *Id.* The mother then obtained an additional modification of the custody decree in New Jersey, which awarded her custody of the

To avoid such parental activities, which were often contrary to the best interests of the children involved, the Commissioners on Uniform State Laws developed the Uniform Child Custody Jurisdiction Act (UCCJA).[16]

The UCCJA prescribes criteria governing initial jurisdiction,[17] interstate enforcement,[18] and interstate modification

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children. *Id.* The courts of North Dakota and New Jersey each refused to enforce the custody decree of the other state. *Id.* at 306. The United States Court of Appeals for the Third Circuit determined that it was necessary to exercise subject matter jurisdiction to resolve the conflict. *Id.* at 312. It reasoned that without a federal forum, state compliance with child custody decrees would become optional and parents would be denied a forum for law suits claiming violations of the PKPA. *Id.* After determining that it had jurisdiction, the court remanded the case to the United States District Court for the District of New Jersey for a final determination. *Id.* at 313.

16. *See* U.C.C.J.A. § 1 (1968). Section 1 of the UCCJA provides as follows:

> (a) The general purposes of this Act are to:
> (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
> (2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
> (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
> (4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
> (5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;
> (6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;
> (7) facilitate the enforcement of custody decrees of other states;
> (8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
> (9) make uniform the law of those states which enact it.
> (b) This act shall be construed to promote the general purposes stated in this section.

Id.; see also N.D. CENT. CODE § 14-14-01 (1981) (North Dakota codification of § 1 of the UCCJA). North Dakota has adopted the UCCJA. *See* Act of Mar. 26, 1969, ch. 154, 1969 N.D. Sess. Laws 289 (codified at N.D. CENT. CODE ch. 14-14 (1981)).

17. *See* U.C.C.J.A. § 3 (1968). Section 3 of the UCCJA provides as follows:

> (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
> (1) this state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
> (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
> (3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or
> (4) (i) it appears that no other state would have jurisdiction under

of child custody decrees.[19] The expressed purposes of the UCCJA are to assure that child custody litigation takes place in the state most closely connected to the family,[20] to avoid jurisdictional conflicts between states,[21] and to deter unilateral removal of children.[22] To accomplish these goals, the UCCJA provides four alternatives that enable a court to exercise subject matter jurisdiction in custody matters. First, a court may make a custody determination if the state in which the court is located is the home state of the child.[23] A state is a "home state" if it has been the

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prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

Id.; see also N.D. CENT. CODE § 14-14-03(1981) (North Dakota codification of § 3 of the UCCJA).

18. *See* U.C.C.J.A. § 13 (1969). Section 13 of the UCCJA provides as follows:

> The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

Id.; see also N.D. CENT. CODE § 14-14-13 (1981) (North Dakota codification of § 13 of the UCCJA). For the jurisdictional standards of the UCCJA, see *supra* note 17.

19. *See* U.C.C.J.A. § 14 (1968). Section 14 of the UCCJA provides as follows:

> (a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.
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> (b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

Id.; see also N.D. CENT. CODE § 14-14-14 (1981) (North Dakota codification of § 14 of the UCCJA). For a discussion of whether jurisdictional prerequisites are "substantially in accordance" with the UCCJA, see *infra* notes 23-28, and accompanying text. For a discussion of the failure of many states to comply with UCCJA § 14, see *infra* note 29.

20. *See* U.C.C.J.A. § 1(a)(3) (1968); N.D. CENT. CODE § 14-14-01(1)(c) (1981) (North Dakota codification of § 1(a)(3) of the UCCJA). For the text of § 1(a)(3) of the UCCJA, see *supra* note 16. *See also* Coombs, *supra* note 9, at 721. Coombs asserts that courts in the state most closely connected with the family are usually best able to obtain evidence concerning the child's care, protection, training, and personal relationships. *Id.* This evidence enables those courts to decide a case in the best interest of the children. *Id.*

21. *See* U.C.C.J.A. § 1(a)(1) (1968); N.D. CENT. CODE § 14-14-01(1)(a) (1981) (North Dakota codification of § 1(a)(1) of the UCCJA). For the text of § 1(a)(1) of the UCCJA, see *supra* note 16. For examples of the types of jurisdictional conflicts arising prior to the establishment of the UCCJA, see *supra* note 15.

22. *See* U.C.C.J.A. § 1(a)(5)(1968); N.D. CENT. CODE § 14-14-01(1)(e) (1981) (North Dakota codification of § 1(a)(5) of the UCCJA). For the text of § 1(a)(5) of the UCCJA, see *supra* note 16. For an example of the type of unilateral removal of children that occurred prior to the establishment of the UCCJA, see *supra* note 12.

23. U.C.C.J.A. § 3(a)(1) (1968); N.D. CENT. CODE § 14-14-03(1)(a) (1981). For the text of § 3(a)(1) of the UCCJA, see *supra* note 17.

residence of a child and his custodial parent for at least six months prior to the commencement of an action.[24] Second, a court may exercise "significant connections" jurisdiction if the following two conditions indicate that it is in the child's best interests: (1) the child and his parents, or the child and at least one contestant, have connections with the state;[25] and (2) there is substantial evidence available in the state concerning the child's care, protection, training, and personal relationships.[26] Third, a court has jurisdiction if an emergency arises while the child is physically present in the state.[27] Finally, a court is free to exercise jurisdiction when no other state has jurisdiction and it is in the best interests of the child.[28] If a court has rendered a custody decree in accordance with the UCCJA, it retains exclusive "continuing jurisdiction" to modify that decree if it has jurisdiction under its own laws, and if the child or any contestant remains a resident of that state.[29]

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24. U.C.C.J.A. § 2(5) (1968); N.D. CENT. CODE § 14-14-02(5) (1981). For a discussion of "home state" status, see *supra* note 5.

25. U.C.C.J.A. § 3(a)(2)(i) (1968); N.D. CENT. CODE § 14-14-03(1)(b)(1) (1981). For the text of § 3(a)(2)(i) of the UCCJA, see *supra* note 17.

26. U.C.C.J.A. § 3(a)(2)(ii) (1968); N.D. CENT. CODE § 14-14-03(1)(b)(2) (1981). For the text of § 3(a)(2)(ii) of the UCCJA, see *supra* note 17.

27. U.C.C.J.A. § 3(a)(3) (1968); N.D. CENT. CODE § 14-14-03(1)(c) (1981). For the text of § 3(a)(3) of the UCCJA, see *supra* note 17.

28. U.C.C.J.A. § 3(a)(4) (1968); N.D. CENT. CODE § 14-14-03(1)(d) (1981). For the text of § 3(a)(4) of the UCCJA, see *supra* note 17.

29. *See* U.C.C.J.A. § 14(a) (1968); N.D. CENT. CODE § 14-14-14(1) (1981). For the text of § 14(a) of the UCCJA, see *supra* note 19. The commissioner's note to § 14 of the UCCJA states as follows:

> Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3.

UNIF. CHILD CUSTODY JURISDICTION ACT § 14 commissioner's note, 9 U.L.A. 116, 154 (1979) (citations omitted). Despite the language of UCCJA § 14(a), and of the commissioner's note accompanying that section, some courts have determined that the continuing jurisdiction of a rendering state may be concurrent with the jurisdiction of states meeting other UCCJA jurisdictional prerequisites. *See, e.g.*, Palm v. Superior Court, 97 Cal. App. 3d 460, 464, 158 Cal. Rptr. 786, 790 (1979) (California had jurisdiction over action to modify custody decree as the home state of the child, and the rendering state had jurisdiction based on the significant connections between the child and the state). Brigette Bodenheimer, the reporter for the UCCJA, has chastised these courts for perpetuating what she calls "the myth of concurrent modification jurisdiction." Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 216 (1981). According to Professor Bodenheimer:

> This "concurrent jurisdiction" theory is incompatible with the clear language of the Act. Section 14 is unambiguous: if the state of the original decree has jurisdiction, a court of another state "shall not modify that decree." In other words, the state of the prior decree alone has jurisdiction to modify its decree. This jurisdiction is exclusive. No other state has authority to hear a petition for modification.

Id. at 216-17; *see also* Kumar v. Superior Court, 32 Cal. 3d 689, 698-700, 652 P.2d 1003, 1009-10, 186 Cal. Rptr. 772, 778-79 (1982). For a discussion of the court's rejection of the "myth of continuing jurisdiction in *Kumar*," see *supra* notes 73-76 and accompanying text.

Unfortunately, the goal of establishing uniform criteria for courts to follow in exercising jurisdiction over child custody matters was hampered by the failure of some states to adopt the Act.[30] In addition, the Act is so flexible that the states which have adopted it may continue to be involved in jurisdictional conflicts.[31] Because the UCCJA proved ineffective in interstate custody disputes, creation of a uniform system to determine jurisdiction over child custody matters became necessary.[32] This uniform system was created in 1980 when the United States Congress enacted the Parental Kidnapping Prevention Act (PKPA).[33] The PKPA requires that courts recognize child custody decrees rendered by courts that exercised jurisdiction in accordance with PKPA

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30. *See* UNIF. CHILD CUSTODY JURISDICTION ACT general statutory notes, 9 U.L.A. 25-26 (Supp. 1986). The District of Columbia, Massachusetts, Mississippi, New Mexico, South Carolina, and Vermont did not adopt the Act until after 1980. *Id.* Although Texas has not adopted the UCCJA, it has adopted a statute similar to the UCCJA's section recognizing out-of-state custody decrees. *Id.* at 27. For the stated goals of the UCCJA, see *supra* note 16.

31. *See* Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984). For a discussion of the jurisdictional conflict presented in *Flood,* see *supra* note 15. *See also* Coombs, *supra* note 9, at 724. Coombs argues that discretionary provisions of the UCCJA provide opportunities for courts of different states to establish different precedents, thereby undermining the uniformity of jurisdictional rules among the states that have adopted the Act. *Id.* Coombs argues that the resultant difference in precedent provides a state with "substantial freedom to indulge in parochial preference for its own initial jurisdiction." *Id.*

32. *See* Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3566, 3568-69 (1980). Section 7 of Public Law 96-611 provides as follows:

> (a) The Congress finds that —
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> (1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different states . . . of the United States;
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> (2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;
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> (3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and
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> (4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions . . . and harm to the welfare of children and their parents and other custodians.
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> (b) for those reasons it is necessary to . . . establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

Id.; see also Coombs, *supra* note 9, at 735. Coombs cites the "considerable variation" among states concerning the exercise of jurisdiction to modify child custody decrees as a primary factor which necessitated the imposition of limits on a state's power to exercise such jurisdiction. *Id.*

33. *See* Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6 to 10, 94 Stat. 3566, 3568-73 (1980) (codified at 28 U.S.C. § 1738A (1982)).

provisions.[34] The jurisdictional provisions of the PKPA,[35] much like those of the UCCJA,[36] present four alternatives by which a state may obtain jurisdiction to render an initial custody decree: (1) that state is the "home state" of the child;[37] (2) it is in the best interest of the child to assume jurisdiction because (a) the child and his parents, or the child and at least one contestant, have significant

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34. *See* 28 U.S.C. § 1738A(a) (1982). Subsection (a) of the PKPA provides as follows: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State." *Id.* For the text of subsection (f) of the PKPA, see *infra* note 43. For a discussion of whether a custody decree has been made consistently with the provisions of the PKPA, see *infra* notes 35, 37-41, and accompanying text.

35. *See* 28 U.S.C. § 1738A(c) (1982). Subsection (c) of the PKPA provides as follows:

> (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if —
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> (1) such court has jurisdiction under the law of such State; and
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> (2) one of the following conditions is met:
>
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
>
> (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;
>
> (D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or
>
> (E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

Id. For a discussion of whether a state is the "home state" of a child, see *infra* note 37. For a discussion of whether a court has continuing jurisdiction pursuant to subsection (d) of the PKPA to modify a custody decree, see *infra* notes 43-44 and accompanying text.

36. *Compare* U.C.C.J.A. § 3 (1968) (UCCJA jurisdictional provisions) *with* 28 U.S.C. § 1738A(c) (1982) (PKPA jurisdictional provisions). For the text of jurisdictional provisions contained in § 3 of the UCCJA, see *supra* note 17. For the text of the jurisdictional provisions contained in subsection (c) of the PKPA, see *supra* note 35. For a discussion of the difference between UCCJA and PKPA jurisdictional provisions, see *infra* note 42.

37. 28 U.S.C. § 1738A(c)(2)(A) (1982). A state may exercise jurisdiction in a child custody action pursuant to subsection (c)(2)(A) of the PKPA if that state is currently the child's home state, or if that state had been the child's home state within six months prior to the commencement of the proceeding and a contestant continues to reside in the state. *Id.* For the text of subsection (c)(2)(A) of the PKPA, see *supra* note 35.

"Home state" is defined by the PKPA as follows:

> "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any such persons are counted as part of the six-month or other period.

Id. § 1738A(b)(4).

connections with the state[38] and (b) there is substantial evidence available in the state concerning the child's care, protection, training, and personal relationships;[39] (3) the child is present in the state, and an emergency situation exists;[40] or (4) no other state has jurisdiction, or another state that may have jurisdiction has declined to exercise it.[41] The PKPA jurisdictional provisions differ from the jurisdictional provisions of the UCCJA in that a court may exercise "significant connections" jurisdiction under the second alternative of the PKPA only if no other state qualifies as the child's "home state."[42]

If a court has rendered a custody decree in accordance with the PKPA, it may retain "continuing jurisdiction" to modify that decree if it has jurisdiction pursuant to its own laws, and if the child or any contestant remains a resident of that state.[43] In considering the first requirement for continuing jurisdiction — whether a rendering court has jurisdiction to modify a custody decree pursuant to the laws of that state — a question regarding the interrelationship between the UCCJA and the PKPA arises.[44]

38. *Id.* § 1738A(c)(2)(B)(ii)(I). In order to exercise "significant connections" jurisdiction pursuant to § (c)(2)(B)(ii)(I) of the PKPA, the connection that the child and the contestant have with the state must be other than mere physical presence in the state. *Id.* For the text of § (c)(2)(B)(ii)(I) of the PKPA, see *supra* note 35.

39. *Id.* § 1738A(c)(2)(B)(ii)(II). For the text of § (c)(2)(B)(ii)(II) of the PKPA, see *supra* note 35.

40. *Id.* § 1738A(c)(2)(C). A state may exercise "emergency jurisdiction" only if the child has been abandoned, or if the child has been subjected to or threatened with mistreatment or abuse. *Id.* For the text of § (c)(2)(C) of the PKPA, see *supra* note 35.

41. *Id.* § 1738A(c)(2)(D). In addition to finding that no other state has jurisdiction, or that any other state having jurisdiction has declined to exercise it, a court may exercise jurisdiction pursuant to PKPA § (c)(2)(D) only if it finds that the best interests of the child will be served. *Id.* For the text of § (c)(2)(C) of the PKPA, see *supra* note 35.

42. *Compare id.* § 1738A(c)(2)(B) *with* U.C.C.J.A. § 3(a)(2) (1968). The PKPA permits a court to exercise jurisdiction based upon the connections between the child and the state only if no other state is the child's home state. *See* 28 U.S.C. § 1738A(c)(2)(B)(i) (1982). The UCCJA, however, permits a state to exercise "significant connections" jurisdiction even in those instances where another state has home state jurisdiction. *See* U.C.C.J.A. § 3(a)(2) (1968). For the PKPA definition of "home State," see *supra* note 37. For a discussion of one court's conclusion that the PKPA is a congressional preemption of child custody matters, and hence that a state may never exercise significant connections jurisdiction when another state has home state status, see *infra* notes 52-61 and accompanying text.

43. 28 U.S.C. § 1738A(d) (1982). *See also id.* § 1738A(c)(2)(E) (a state may exercise jurisdiction in child custody matters consistent with the PKPA if it has continuing jurisdiction pursuant to section (d) of the Act). For a discussion of whether a court has jurisdiction pursuant to its own laws, see *infra* note 44. The PKPA defines "contestant" as "a person, including a parent, who claims a right to custody or visitation of a child." *Id.* § 1738A(b)(2); *see also id.* § 1738A(f). Subsection (f) of the PKPA provides as follows:

> A court of a State may modify a determination of the custody of the same child made by a court of another State, if —
>
> (1) it has jurisdiction to make such a child custody determination; and
>
> (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Id. For a discussion of a provision in the UCCJA which likewise provides that continuing jurisdiction be exclusive, and of the failure of some courts to respect the exclusivity of UCCJA continuing jurisdiction, see *supra* note 29.

44. *Compare* 28 U.S.C. § 1738A(d) (1982) (a state may exercise continuing jurisdiction only if it continues to have jurisdiction under its own law) *with* U.C.C.J.A. § 3 (1968) (a state has jurisdiction

Courts have generally applied one of two methodologies in resolving this question.[45]

The first methodology employed to determine whether a rendering court has jurisdiction to modify a custody decree pursuant to the laws of that state is demonstrated in *In re Mebert.*[46] In *Mebert,* a New York Family Court issued a divorce decree granting custody to the mother.[47] The child's father was granted visitation rights.[48] The child and his mother then moved to Connecticut where they remained for a period of at least six months.[49] The father filed a petition for modification in New York,[50] and the mother moved for dismissal, claiming that the New York court lacked subject matter jurisdiction.[51]

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over child custody matters under its own law if one of four alternatives is met). In declaring that a state retains continuing jurisdiction only if it continues to have jurisdiction pursuant to state law, it is unclear whether the PKPA requires a showing that facts existing at the time of modification would be sufficient to give it jurisdiction under state law to issue an initial custody decree, or whether a state must show that the facts existing at the time of the initial decree which gave it jurisdiction to render that decree continue to exist. *See* Dennis v. Dennis, 366 N.W.2d 474, 480 (N.D. 1985) (Meschke, J., concurring) (requiring the existence of facts at the time of modification which would be sufficient to allow a state to obtain initial jurisdiction is an inappropriate reading of the PKPA). Moreover, it is uncertain whether reference by the PKPA to "the law of such state" refers only to a state's version of the UCCJA, or whether jurisdiction may be retained under other provisions of state law. *See generally id.* (section 14-05-22 of the North Dakota Century Code, which authorizes a court to modify custody provisions of divorce decrees, permits a court to retain continuing jurisdiction over custody matters). Finally, courts have considered the PKPA a congressional preemption of child custody matters, and thus determined that a state has jurisdiction pursuant to its own laws only if it fulfills PKPA jurisdictional provisions. *See In re* Mebert, 111 Misc. 2d 500, 444 N.Y.S.2d 834, 840 (Fam. Ct. 1981). *Compare* 28 U.S.C. § 1738A(c)(2) (1982) (alternatives under which a state may exercise jurisdiction pursuant to PKPA) *with* U.C.C.J.A. § 3 (1968) (alternatives under which a state may exercise jurisdiction pursuant to UCCJA). For a discussion of the *Mebert* decision, see *infra* notes 46-61 and accompanying text. For a discussion of the four alternatives under which a state may exercise jurisdiction pursuant to the PKPA, see *supra* notes 35, 37-41, and accompanying text.

45. *Compare In re* Mebert, 111 Misc. 2d 500, 444 N.Y.S.2d 834 (Fam. Ct. 1981) (state retains continuing jurisdiction only if facts exist at time of modification which are sufficient to permit it to exercise jurisdiction to issue an initial decree consistent with PKPA) *with* Kumar v. Superior Court, 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982) (state retains continuing jurisdiction only if facts exist at time of modification which are sufficient to permit it to exercise jurisdiction to issue an initial decree pursuant to UCCJA). For a discussion of the methodology employed in *Mebert* to determine whether a state retains continuing jurisdiction pursuant to its own laws, see *supra* notes 52-61 and accompanying text. For a discussion of the methodology employed in *Kumar* to determine whether a state retains continuing jurisdiction pursuant to its own laws, see *supra* notes 69-82 and accompanying text. *See also* Dennis v. Dennis, 366 N.W.2d 474, 481 (N.D. 1985) (Meschke, J. concurring) (North Dakota retains continuing jurisdiction to modify its child custody decrees as long as it has in personam jurisdiction over both contesting parties). For a discussion of Justice Meschke's concurring opinion in *Dennis,* see *infra* notes 97-106 and accompanying text.

46. 111 Misc. 2d 500, 444 N.Y.S.2d 834 (Fam. Ct. 1981).

47. *In re* Mebert, 111 Misc. 2d 500, ____, 444 N.Y.S.2d 834, 835 (Fam. Ct. 1981).

48. *Id.*

49. *Id.* at ____, 444 N.Y.S.2d at 839, 840. In *Mebert,* the child and his mother had lived in Connecticut for the six months preceding the petition to modify the custody provisions of the divorce decree. *Id.* Though the mother continued to reside in Connecticut, the child ran away and resided in New York with his father during the pendency of the petition. *Id.*

50. *Id.* at ____, 444 N.Y.S.2d at 835. On June 26, 1981, the father filed a petition for modification of the custody provisions of the divorce decree in the New York Family Court for Onondaga County. *Id.* The father sought sole custody of his child. *Id.*

51. *Id.* at ____, 444 N.Y.S.2d at 836. On July 24, 1981, a hearing was held on the father's petition for modification. *Id.* at ____, 444 N.Y.S.2d at 835. The mother failed to appear. *Id.* The matter was adjourned until July 28, 1981, and the mother again failed to appear. *Id.* at ____, 444 N.Y.S.2d at 836. In an envelope dated September 5, 1981, the court received the mother's motion to

In determining whether it had subject matter jurisdiction, the court noted that the PKPA permits modification of custody decrees only in accordance with PKPA provisions.[52] The court further noted that a rendering state does not retain continuing jurisdiction under the PKPA unless that state has jurisdiction under state law.[53] Applying the facts of the case at the time of the petition for modification to New York's version of the UCCJA, the court found that state law would permit assumption of "significant connections" jurisdiction.[54] The court further noted, however, that the PKPA preempts state law,[55] and that the PKPA permits

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dismiss. *Id.* The mother contended that the court lacked subject matter jurisdiction, and that she was not served with notice of the proceeding in a timely manner. *Id.* Also in the envelope were copies of papers prepared by respondent for a proceeding in a Connecticut court on September 10, 1981. *Id.*

52. *Id.* at ____, 444 N.Y.S.2d at 840; *see* 28 U.S.C. § 1738A(a) (1982). For the text of subsection (a) of the PKPA, see *supra* note 34. The court in *Mebert* noted that the initial custody determination had been made consistently with the provisions of the PKPA by stating that "[t]hese provisions, essentially, are those jurisdictional bases set out in the *Uniform Child Custody Jurisdiction Act* and adopted by New York as section 75-d of the Domestic Relations Law." 111 Misc. 2d at ____, 444 N.Y.S.2d at 840. *Compare* 28 U.S.C. § 1738A(c)(2) (1982) *with* N.Y. DOM. REL. LAW § 75-d (McKinney Supp. 1986). For a discussion of whether a custody determination is made consistently with the provisions of the PKPA, see *supra* notes 35, 37-41, and accompanying text.

53. 111 Misc. 2d at ____, 444 N.Y.S.2d at 840; *see* 28 U.S.C. § 1738A(d) (1982). The court stated as follows: "According to the federal law the jurisdiction of a court of a state that has made a child custody determination continues as long as the court has jurisdiction pursuant to subsection (c)(1) of [the PKPA]." 111 Misc. 2d at ____, 444 N.Y.S.2d at 840. Subsection (c)(1) of the PKPA requires that "such court has jurisdiction under the law of such State." 28 U.S.C. § 1738A(c)(1) (1982). For a discussion of whether a court has jurisdiction under state law, see *supra* note 44.

54. 111 Misc. 2d at ____, 444 N.Y.S.2d at 838-39; *see* N.Y. DOM. REL. LAW § 75-d(1)(b) (McKinney Supp. 1986); U.C.C.J.A. § 3(a)(2) (1968). The child had significant connections with New York because he had lived there throughout his life. 111 Misc. 2d at ____, 444 N.Y.S.2d at 839. Also, though the child "lives in Connecticut," he had left his custodial parent and was residing with his father in New York at the time of the modification proceedings. *Id.* at ____, 444 N.Y.S.2d at 836. The court found that the child's father, a "contestant," also had significant contacts with New York. *Id.* at ____, 444 N.Y.S.2d at 839; *see* N.Y. DOM. REL. LAW § 75-c(1) (McKinney Supp. 1986) (a parent claiming a right to visitation or custody included within the definition of "contestant"); U.C.C.J.A. § 2(1) (1968) (UCCJA definition of "contestant" similar to the New York definition). The father lived in New York, worked in New York, was married in New York, signed a separation agreement granting custody of his children to his former wife in New York, and was divorced in New York. 111 Misc. 2d at ____, 444 N.Y.S.2d at 839.

The court also found that the child's father could provide information about the child's present and future protection, care, schooling, and other training. *Id.* Significant information about the child's personal relationships was available in New York as well, since he was in New York and could testify on this issue. *Id.*

Having found that the child and one contestant had significant connections with New York, and that there was substantial evidence concerning the child available in that state, the court addressed the final requirement for "significant connections" jurisdiction by stating that "[i]t is in the best interest of the child, Thomas Mebert, that this court assume jurisdiction." *Id.* The court also noted that New York appellate courts had found it to be error to refuse significant contacts jurisdiction when the above three elements are present. *Id.* at ____, 444 N.Y.S.2d at 838; *see* People *ex rel.* Morgan v. Morgan, 79 A.D.2d 1060, 435 N.Y.S.2d 165 (1981). For the text of the UCCJA provisions concerning "significant connections" jurisdiction, see *supra* note 17.

55. 111 Misc. 2d at ____, 444 N.Y.S.2d at 838. The court in *Mebert* noted the suggestion of some commentators that the full faith and credit clause grants Congress the "power to enact standards whereby uniformity of state legislation may be secured as to most any matter in connection with which interstate recognition of private rights would be useful and valuable." *Id.* at ____, 444 N.Y.S.2d at 841 (quoting THE CONSTITUTION OF THE UNITED STATES OF AMERICA 829 (L. Jayson, ed. 1973)); *see* U.S. CONST. art IV, § 1 (full faith and credit clause). For the text of the full faith and credit clause to the United States Constitution, see *supra* note 11. Thus the court noted that it "must abide by the jurisdictional prerequisites enacted by Congress for custody disputes." *Id.*; *see* Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations

assumption of jurisdiction based on the connections between the child and the state only if no other state is the child's home state.[56] Because the child had resided in Connecticut for a period in excess of six months, Connecticut was the child's home state.[57] Thus the court in *Mebert* held that New York did not have jurisdiction to modify the original decree.[58]

Under the methodology employed in *Mebert,* then, a state has jurisdiction "under state law" to modify an existing custody decree only if it could issue an initial decree under the PKPA at the time modification is sought.[59] Because the PKPA permits assumption of jurisdiction to issue an initial decree based on the best interests of the child only if no other state is the child's home state,[60] the *Mebert* methodology will invariably result in the loss of jurisdiction by a

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Comm'r, 427 U.S. 132, 138-39 (1976) (when a state law conflicts with a federal statute, it is preempted).

56. 111 Misc. 2d at ____, 444 N.Y.S.2d at 838. *Compare* 28 U.S.C. § 1738A(c)(2)(B) (1982) *with* N.Y. DOM. REL. LAW § 75-d(b) (McKinney Supp. 1986) *and* U.C.C.J.A. § 3(a)(2) (1968). For a discussion of the differences between the PKPA and the UCCJA provisions governing "significant connections" jurisdiction, see *supra* note 42.

57. *See* 111 Misc. 2d at ____, 444 N.Y.S.2d at 840. The court in *Mebert* indicated that there may be some question concerning whether New York or Connecticut was the child's "home state." *Id. Compare* N.Y. DOM. REL. LAW § 75-c(5) (McKinney Supp. 1986) (New York definition of "home state") *and* 111 Misc. 2d at ____, 444 N.Y.S.2d at 838 (application of New York definition of "home state" to facts in *Mebert*) *with* 28 U.S.C. § 1738A(b)(4) (1982) (PKPA definition of "home state") *and* 111 Misc. 2d at ____, 444 N.Y.S.2d at 840 (application of PKPA definition of "home state" to facts in *Mebert*). New York law defines "home state" as "the state in which the child at the time of the commencement of the custody proceeding, has resided with. . . a parent. . . for at least six consecutive months." N.Y. DOM. REL. LAW § 75-c(5) (McKinney Supp. 1986); *see also* U.C.C.J.A. § 2(5)(1968) (UCCJA definition of "home state" similar to New York definition). The PKPA, however, defines "home state" as "the State in which, *immediately preceding the time involved,* the child lives with. . . a parent. . . for at least six consecutive months. . . ." 28 U.S.C. § 1738A(b)(4) (1982) (emphasis added). Because it concluded that the PKPA was a congressional preemption of child custody matters, the court applied the federal definition. 111 Misc. 2d at ____, 444 N.Y.S.2d at 839-40. In so doing, the court concluded that "Connecticut is the home state of Thomas Mebert, in that he had lived in that state for the six months immediately prior to the filing on June 26, 1981 of the petition to modify the custody provisions of the divorce decree and his bus trip to New York constituted a temporary absence from the State of Connecticut." *Id.* at ____, 444 N.Y.S.2d at 840.

58. 111 Misc. 2d at ____, 444 N.Y.S.2d at 841. The court in *Mebert* noted that, pursuant to New York law, the best interest of the child is of primary importance in custody determinations. *Id.* at ____, 444 N.Y.S.2d at 840. The court went on, however, to state as follows:

> With the enactment of the federal statute and its different definition of "home state" the jurisdictional bases which must be established before the court may look to the best interests of the child have been changed . . . . From its plain reading of the statute, this court must conclude that under federal law the best interest of the child can not be looked at in a custody matter unless the jurisdictional prerequisites set forth in the federal statute are met, including the requirement that the child "immediately preceding the time involved" must have lived in this state with one of its parents for at least six consecutive months.

Id. at ____, 444 N.Y.S.2d at 840-41. *But see supra* note 54 (discussion of court's conclusion in *Mebert* that, pursuant to New York's UCCJA, a court may exercise "significant connections" jurisdiction if it is in the best interests of the child). *Compare* 28 U.S.C. § 1738A(c)(2)(B) (1982) *with* N.Y. DOM. REL. LAW § 75-d(b) (McKinney Supp. 1986) *and* U.C.C.J.A. § 3(a)(2) (1968). For a discussion of the differences between the PKPA and the UCCJA provisions governing "significant connections" jurisdiction in general, see *supra* note 42.

59. *See supra* notes 52-56 and accompanying text.

60. *See supra* note 42.

rendering state once the child has lived in another state for a period of six months.[61]

Because neither the PKPA nor the UCCJA was intended to result in the loss of continuing jurisdiction once a child has obtained a new home state,[62] an alternative methodology for determining whether a court has jurisdiction pursuant to the laws of that state was employed by the California Supreme Court in *Kumar v. Superior Court.*[63] In *Kumar,* Yvonne and Jitendra Kumar were divorced in New York.[64] Yvonne received custody of their only child, and Jitendra was granted visitation rights.[65] Five years after the divorce, Yvonne and the child moved to California where they lived for more than six months.[66] Yvonne sought an order to show cause in California to modify the New York order,[67] and Jitendra moved to dismiss for lack of subject matter jurisdiction.[68]

The California court began its analysis by noting that,

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61. *Compare Mebert,* 111 Misc. 2d at ____, 444 N.Y.S.2d at 840-41 (federal law concerning when a state may exercise jurisdiction over custody matters preempts state law on that issue) *with* 28 U.S.C. § 1738A(c)(2)(B)(i) (1982) (a court may exercise "significant connections" jurisdiction consistent with PKPA only if no other state is child's "home state") *and id.* § 1738A(b)(4) ("home state" is state in which, immediately preceding the time involved, the child lived with a parent for at least six consecutive months).

62. Both the PKPA and the UCCJA, in similar language, provide that a state may modify a custody determination only if the rendering state no longer has or refuses to exercise continuing jurisdiction. *See* 28 U.S.C. § 1738A(f)(2) (1982); U.C.C.J.A. § 14(a) (1968). The commissioner's note to § 14 of the UCCJA clearly demonstrates that loss of home state status does not revoke continuing jurisdiction:

> [I]f custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6 1/2 months (3 1/2 months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child.

See U.C.C.J.A. § 14 commissioner's note (1968). In light of the commissioner's note to the UCCJA, and in light of the PKPA's deference to state law in determining whether a state retains continuing jurisdiction, neither the PKPA nor the UCCJA could have been intended to require that a state loses jurisdiction over its custody determinations once the child has obtained a new home state. *See* 28 U.S.C. § 1738A(d) (1982) (state retains continuing jurisdiction if it has jurisdiction under its own laws).

63. 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982).

64. Kumar v. Superior Court, 32 Cal. 3d 689, 691, 652 P.2d 1003, 1004, 186 Cal. Rptr. 772, 773 (1982).

65. *Id.*

66. *Id.* The parties were granted a divorce in 1974, and continued to live in New York. *Id.* Jitendra regularly exercised his visitation rights until April of 1979, when Yvonne called from Tennessee to say she and their child were on their way to California. *Id.* at 692, 652 P.2d at 1005, 186 Cal. Rptr. at 774.

67. *Id.* at 691, 652 P.2d at 1004, 186 Cal. Rptr. at 773. In July 1980 Jitendra registered the New York custody decree in California, and had his visitation rights enforced in that state. *Id.* Jitendra later served Yvonne with a motion to modify the custody and visitation provisions of the initial decree in a New York court. *Id.* After receiving the New York papers, Yvonne sought an order to show cause in California. *Id.* Yvonne requested that the California court modify the visitation and support provisions of the New York order, determine alleged spousal support arrearages, and award her attorneys' fees. *Id.*

68. *Id.* Jitendra argued, in part, that California had no authority to modify the New York decree "unless New York declines to exercise its continuing jurisdiction to modify." *Id.* at 694, 652 P.2d at 1006, 186 Cal. Rptr. at 775.

pursuant to section 14(a) of the UCCJA, it could not modify a New York decree unless New York did not retain or refused to exercise continuing jurisdiction.[69] In order to determine whether New York had retained continuing jurisdiction, the court applied the facts existing at the time of the petition for modification to New York's version of the UCCJA.[70] The court concluded that, at the time the original decree was granted, New York had jurisdiction as the home state of the child.[71] After the child and his custodial parent had moved to California, however, New York retained continuing jurisdiction based upon the significant connection between the child and the state.[72]

Rejecting the contention that California had jurisdiction as the child's home state,[73] the court stated that this confusion "can be avoided by clearly distinguishing between initial and modification jurisdiction."[74] Because modification jurisdiction is "an extension of the recognition and enforcement provisions of the Uniform

69. *Id.* at 694, 652 P.2d at 1007, 186 Cal. Rptr. at 776; *see* CAL. CIV. CODE § 5163 (1) (1983); U.C.C.J.A. § 14(a) (1968); *see also* 28 U.S.C. § 1738A(f)(2) (1982) (PKPA provision similarly restricting ability of state to modify custody decrees rendered in other states). For a general discussion of when a state may modify a custody decree, see *supra* note 43.

70. *See* 32 Cal. 3d at 696-97, 652 P.2d at 1007-08, 186 Cal. Rptr. at 776-77. The court stated that the first question is "whether New York, which rendered the initial decree in this case, now has jurisdiction under the 'jurisdictional prerequisites' of the Uniform Act." *Id.* at 696, 652 P.2d at 1007, 186 Cal. Rptr. at 776.

71. *Id.; see* N.Y. DOM. REL. LAW § 75-d(1)(a) (McKinney Supp. 1986); U.C.C.J.A. § 3(a)(1) (1968). For the text of § 3(a)(1) of the UCCJA, which is identical to § 75-d(1)(a) of the New York Domestic Relations Law, see *supra* note 17. For a discussion of whether a state is the "home state" of a child, see *supra* note 57.

72. 32 Cal. 3d at 697, 652 P.2d at 1008, 186 Cal. Rptr. at 777. *See* N.Y. DOM. REL. LAW § 75-d(1)(b) (McKinney Supp. 1986); U.C.C.J.A. § 3(a)(2) (1968). For the text of § 3(a)(2) of the UCCJA, which is identical to § 75-d(1)(b) of the New York Domestic Relations Law, see *supra* note 17.

The court found that Jitendra was a full time resident of New York, and that the child's maternal grandparents, numerous family friends, relatives, doctors, and teachers continue to live in that state. 32 Cal. 3d at 697, 652 P.2d at 1008, 186 Cal. Rptr. at 777. The court further found that the child maintained these connections with New York, and that evidence concerning his familial, social, and educational welfare was available there. *Id.* Thus the court determined that "[t]he conclusion is inescapable that New York. . . [is]. . . a state which now has jurisdiction 'under jurisdictional prerequisites substantially in accordance with [the UCCJA].' " *Id.* Pursuant to California's UCCJA, then, New York retained exclusive jurisdiction over the matter. *See* CAL. CIV. CODE § 5163(1) (1983); U.C.C.J.A. § 14(a) (1968).

73. *See* 32 Cal. 3d at 698, 652 P.2d at 1009, 186 Cal. Rptr. at 778. Yvonne contended that, pursuant to its version of UCCJA § 3, California had jurisdiction as the child's home state. *Id.; see* CAL. CIV. CODE § 5152(1)(a) (1983); U.C.C.J.A. § 3(a)(1) (1968). For the text of § 3(a)(1) of the UCCJA, which is identical to § 5152(1)(a) of the California Civil Code, see *supra* note 17. For a discussion of whether a state is a child's "home state," see *supra* note 57.

Section 3(a)(1) of the UCCJA would have permitted California to assume jurisdiction in *Kumar* if it had been an action for an initial custody decree. *See id.* Section 14(a)(1) of the UCCJA, however, restricts a state's ability to assume jurisdiction over custody matters in which another state has previously rendered a determination. *See* CAL. CIV. CODE § 5163(1)(a) (1983); U.C.C.J.A. § 14(a)(1) (1968). Because an initial custody determination had already been made in New York, California's status as the child's home state would permit assumption of jurisdiction only if New York no longer retained or declined to exercise continuing jurisdiction. *Id.* For the text of § 14(a)(1) of the UCCJA, which is identical to § 5163(1)(a) of the California Civil Code, see *supra* note 19. For a discussion of the court's treatment in *Kumar* of the difference between "initial jurisdiction" and "continuing jurisdiction," see *infra* notes 74-76 and accompanying text.

74. 32 Cal. 3d at 699, 652 P.2d at 1009, 186 Cal. Rptr. at 778.

Act,"[75] and because "California is not effectively enforcing the New York decree if it modifies the decree as soon as the child has spent six months within its borders,"[76] the court concluded that California did not have jurisdiction to modify the decree.

Turning to the PKPA, the court noted that the federal statute compels the same result as the UCCJA.[77] Under the PKPA, California could modify the New York decree only if New York did not retain continuing jurisdiction,[78] and the prior analysis of New York's UCCJA demonstrated that New York did have jurisdiction pursuant to that state's laws.[79]

Thus, according to the methodology employed in *Kumar,* whether a state has jurisdiction pursuant to its own laws depends upon application of the facts of the case existing at the time of the petition for modification to that state's version of the UCCJA.[80] Since the UCCJA permits continuing jurisdiction even if there is a new home state,[81] the *Kumar* methodology would permit retention of continuing jurisdiction whenever the rendering state retained significant connections with the child.[82]

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75. *Id.* The court distinguished "initial jurisdiction" from "modification jurisdiction" as follows:

> *Initial* jurisdiction is determined by the guidelines of [UCCJA § 3], which point to the state with the closest connections to the child and to information about his present and future well-being. *Modification* jurisdiction is perhaps best viewed as an extension of the recognition and enforcement provisions of the Uniform Act.

Id. (emphasis in original). *Compare* CAL. CIV. CODE § 5152 (1983) (grounds under which California may assume jurisdiction in a child custody case) *and* U.C.C.J.A. § 3 (1968) (UCCJA provision identical to § 5152 of the California Civil Code) *with* CAL. CIV. CODE § 5163 (1983) (limits on when California may assume jurisdiction to modify a custody determination of another state) *and* U.C.C.J.A. § 14 (1968) (UCCJA provision identical to § 5163 of the California Civil Code). For the text of UCCJA § 3, see *supra* note 17. For the text of UCCJA § 14, see *supra* note 19. *See also* CAL. CIV. CODE § 5162 (1983) (recognition and enforcement provisions of California's UCCJA); U.C.C.J.A. § 13 (1968) (UCCJA provision identical to § 5162 of the California Civil Code).

76. 32 Cal. 3d at 699, 652 P.2d at 1009, 186 Cal. Rptr. at 778; *see* CAL. CIV. CODE § 5162 (1983) (recognition and enforcement provisions of California's UCCJA); U.C.C.J.A. § 13 (1968) (UCCJA provision identical to § 5162 of the California Civil Code). The court stated that failure to distinguish between initial and continuing jurisdiction ignores the intent of the UCCJA that a rendering court retains exclusive continuing jurisdiction, and serves to perpetuate what the reporter for the UCCJA has labeled "the myth of concurrent modification jurisdiction." 32 Cal. 3d at 698, 652 P.2d at 1009, 186 Cal. Rptr. at 778. For a discussion of the myth of concurrent modification jurisdiction, see *supra* note 29.

77. 32 Cal. 3d at 701, 652 P.2d at 1011, 186 Cal. Rptr. at 780. For a discussion of the application of the UCCJA to the facts in *Kumar,* see *supra* notes 69-76 and accompanying text.

78. *See* 28 U.S.C. § 1738A(f)(2) (1982). California could also modify the New York decree if New York had continuing jurisdiction but had declined to exercise it. *Id.* For the text of § (f)(2) of the PKPA, see *supra* note 43.

79. *See supra* notes 69-76 and accompanying text.

80. *See* 32 Cal. 3d at 696, 652 P.2d at 1007-08, 186 Cal. Rptr. at 776. The court stated that the first question in determining whether continuing jurisdiction exists is "whether New York, which rendered the initial decree in this case, now has jurisdiction under the 'jurisdictional prerequisites' of the Uniform Act." *Id.* at 696, 652 P.2d at 1007, 186 Cal. Rptr. at 776.

81. *See* U.C.C.J.A. § 3(a)(2) (1968); *see also supra* note 42.

82. *See* 32 Cal. 3d at 699, 652 P.2d at 1008-09, 186 Cal. Rptr. at 778; U.C.C.J.A. § 3(a)(2) (1968). *But see In re* Mebert, 111 Misc. 2d ____, 444 N.Y.S.2d 834 (1981) (rendering state does not retain continuing jurisdiction over child custody matter even though it has significant connections with the child). For a discussion of *Mebert,* see *supra* notes 46-61 and accompanying text.

The North Dakota Supreme Court had not considered the interrelationship between the PKPA and the UCCJA prior to *Dennis v. Dennis.*[83] In *Dennis,* all justices agreed that the trial court erred in denying Earl's modification request solely because Iowa had become the children's home state.[84] Moreover, all members of the court were in agreement that the PKPA provisions governing continuing jurisdiction controlled, and that Earl's continued residence in North Dakota satisfied the first of those provisions.[85] There was disagreement among the court, however, concerning the methodology to be employed in determining whether the second part of the test for continuing jurisdiction was satisfied.[86]

Chief Justice Erickstad, in an opinion joined by Justice Gierke, resolved the second part of the test for continuing jurisdiction by employing a methodology similar to that employed in *Kumar.*[87] In his view, whether a trial court has jurisdiction under state law depends upon application of North Dakota's version of the UCCJA to the facts existing at the time of the petition for modification.[88] Justice Erickstad concluded that the trial court did not have continuing jurisdiction as the children's home state because the children had lived in Iowa for more than six months.[89]

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83. 366 N.W.2d 474 (N.D. 1985).

84. Dennis v. Dennis, 366 N.W.2d 474, 477-78 (N.D. 1985) (2-2-2 decision). The district court denied Earl's request for modification concluding that Iowa, not North Dakota, had jurisdiction to decide the case. *Id.* at 475.

85. *See id.* at 476, 477, 478; *see also* U.S.C. § 1738A(d) (1982). Pursuant to § (d) of the PKPA, a court retains continuing jurisdiction if that state remains the residence of the child or any contestant and the court has jurisdiction under state law. *Id.* Because Earl was a contestant, and because he was a resident of North Dakota, the first requirement for continuing jurisdiction was met. 366 N.W.2d at 476; *see* 28 U.S.C. § 1738A(2) (1982) (PKPA definition of "contestant"). For a discussion of the PKPA requirements for continuing jurisdiction, see *supra* note 43 and accompanying text.

86. *See id.* at 476, 477, 480; *see also* 28 U.S.C. § 1738A(d) (1982). In addition to requiring that the child or at least one contestant remain a resident of the state, the PKPA requires that a state have jurisdiction pursuant to its own laws in order that it may retain continuing jurisdiction. *Id.* For a discussion of this latter requirement for continuing jurisdiction, see *supra* note 44. For a discussion of the PKPA requirements for continuing jurisdiction in general, see *supra* note 43.

87. *See* 366 N.W.2d at 476-77 (per Erickstad, C.J.). For a discussion of the methodology employed in *Kumar,* see *supra* notes 69-82 and accompanying text.

88. *Id.* at 476; *accord* Kumar v. Superior Court, 32 Cal. 2d 689, 696, 652 P.2d 1003, 1007, 186 Cal. Rptr. 772, 776 (1982) (the first step in determining whether a state retains continuing jurisdiction is to determine whether that state now has jurisdiction under jurisdictional prerequisites of the UCCJA; *see* N.D. CENT. CODE ch. 14-14 (1981) (North Dakota's version of the UCCJA). Chief Justice Erickstad stated that "North Dakota, to assume jurisdiction to modify the original decree, must currently meet the jurisdictional requirements found within our codification of the UCCJA." 366 N.W.2d at 476; *see* N.D. CENT. CODE § 14-14-03(1) (1981) (requirements for assumption of jurisdiction in child custody matters); U.C.C.J.A. § 3(a) (1968) (UCCJA jurisdictional requirements which are identical to those contained in § 14-14-03(1) of the North Dakota Century Code). For the text of § 3(a) of the UCCJA, see *supra* note 17.

89. 366 N.W.2d at 476-77. Chief Justice Erickstad stated that "the district court did not err in refusing to exercise jurisdiction under [the "home state "provisions of the UCCJA], because Iowa, and not North Dakota, is currently the children's home state where they have resided with their custodial parents for more than three years." *Id.; see* N.D. CENT. CODE § 14-14-03(1)(a) (1981) (home state provisions of North Dakota's UCCJA); U.C.C.J.A. § 3(a)(1) (1968) (UCCJA home state provisions); N.D. CENT. CODE § 14-14-02(5) (1981) (North Dakota definition of home state); U.C.C.J.A. § 2(5) (1968) (UCCJA definition of home state). For the text of North Dakota's statutory provisions governing assumption of jurisdiction as a home state, see *supra* note 5.

The Chief Justice noted, however, that the UCCJA also permits a state to exercise jurisdiction based on the significant connections between the child and the state.[90] Because it was impossible for the court to determine whether, and to what extent, the district court had considered this second alternative for the assumption of jurisdiction,[91] Chief Justice Erickstad wished to remand the case for a redetermination of the jurisdictional issue.[92]

Justice VandeWalle, with whom Justice Gierke concurred, agreed with the Chief Justice's conclusion that the matter should be remanded for consideration of the jurisdictional issue.[93] He did, however, express concern with Justice Erickstad's observation that the trial court did not have continuing jurisdiction as the children's home state.[94] Justice VandeWalle feared that others might mistakenly believe that a methodology similar to that in *Mebert* had been employed, and hence a state might be thought to have lost jurisdiction to modify custody decrees once the children have resided in another state for six months.[95] Rather than risk reducing the issue of jurisdiction to a mathematical formula, Justice VandeWalle was of the opinion that the trial court should retain jurisdiction to modify the provisions for visitation as long as Earl resides in North Dakota and visitation occurs in North Dakota.[96]

Justice Meschke, with whom Justice Levine concurred,

90. 366 N.W.2d at 477; *see* N.D. CENT. CODE § 14-14-03(1)(b) (1981); U.C.C.J.A. § 3(a)(2) (1968). For a discussion of "significant connections" jurisdiction, including text of the relevant UCCJA provisions, see *supra* notes 17, 25-26, and accompanying text.

91. 366 N.W.2d at 477. The district court denied Earl's request for modification on the grounds that it lacked subject matter jurisdiction. *Id.* at 475. The district court made this determination solely because Iowa was the children's home state. *See id.* The court did not consider whether jurisdiction could be based on the connections between the children and the state, and thus did not consider the extent of those connections. *See id.* at 475, 477.

92. *Id.* at 477.

93. *Id.* (VandeWalle, J., concurring specially).

94. *Id.; see supra* note 89, *infra* note 95, and accompanying text.

95. 366 N.W.2d at 477. In determining that the trial court did not have jurisdiction as the children's home state, Chief Justice Erickstad stated "[t]hat conclusion is supported by a number of courts which have recognized that subsequent to entry of an original custody decree by a child's home state, another state can become the home state and obtain jurisdiction to modify the original decree." *Id.* (per Erickstad, C.J.). Justice Erickstad cited *Mebert* as one case recognizing that a state may obtain jurisdiction to modify a custody decree by becoming the home state of the children. *Id.* This language, according to Justice VandeWalle, "appears to indicate that the PKPA and UCCJA require that after the children have resided in another State for six months North Dakota courts lose jurisdiction to modify the custody or visitation provisions of the decree." *Id.* (VandeWalle, J., concurring specially). For a discussion of the *Mebert* decision, and its conclusion that a state loses jurisdiction over custody matters once the children acquire a new home state, see *supra* notes 46-61 and accompanying text.

96. *Id.* (VandeWalle, J., concurring specially). Justice VandeWalle based his conclusion that the trial court should retain jurisdiction to modify the visitation provisions of the initial decree on the fact that visitation privileges are focused upon the best interests of the child. *Id.* According to Justice VandeWalle, courts of the state in which a divorce decree was granted, in which the noncustodial parent continues to reside, and in which the children will be visiting are in the best position to determine how visitation will serve the best interests of the child. *Id.* Justice VandeWalle noted that these factors indicate only that North Dakota should retain jurisdiction to modify visitation provisions. *Id.* They do not indicate that it should retain jurisdiction to modify custody provisions. *Id.*

disagreed with the methodology employed by the Chief Justice.[97] He noted that the PKPA and the UCCJA are intended to reduce forum shopping and to strengthen full faith and credit.[98] Because it would weaken a rendering state's priority over custody decrees, Justice Meschke concluded that determining whether there are sufficient connections to permit assumption of jurisdiction at the time of the petition for modification was inconsistent with those underlying objectives.[99] A proper analysis in Justice Meschke's view, would be to determine first whether the trial court had jurisdiction under the PKPA to render the initial decree.[100] If so, Justice Meschke would permit the trial court to retain jurisdiction to modify that decree as long as it retained in personam jurisdiction over the parties.[101] Thus, according to the methodology

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97. *See id.* at 480 (Meschke, J., concurring specially).

98. *Id.; see* Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3566, 3569 (1980) (Congressional statement of findings and purposes leading to the enactment of the PKPA). For the text of § 7 of Public Law 96-611, see *supra* note 32.

99. 366 N.W.2d at 480. *Compare id.* at 476 (per Erickstad, C.J.) (North Dakota retains continuing jurisdiction only if it currently meets the jurisdictional requirements of the UCCJA). Justice Meschke stated as follows:

> [T]o apply this "new proceeding" jurisdictional analysis in a case like this is inconsistent with the underlying objectives of both the U.C.C.J.A. and P.K.P.A. to reduce forum shopping and to strengthen full faith and credit for custody decrees. Both acts accomplish these objectives by plainly according a continuing jurisdictional priority, through res judicata and full faith and credit, to the custody decree of the first state in which a custody proceeding is properly initiated, so long as it has connections with either the children or one of the parties. Both res judicata and full faith and credit must normally extend more than six months, even when the best interests of children are involved.

Id. at 480-81 (Meschke, J., concurring specially) (footnotes omitted). *But see* N.D. CENT. CODE § 14-14-14(1) (1981). Justice Meschke's opinion that continuing jurisdiction does not depend upon there being connections at the time of the petition for modification sufficient to permit a court to assume jurisdiction were this an application for an initial decree ignores the declaration of § 14 of the UCCJA that a state retains exclusive continuing jurisdiction as long as it *now* has "jurisdiction under jurisdictional prerequisites substantially in accordance" with the UCCJA. *See* N.D. CENT. CODE § 14-14-14(1) (1981); U.C.C.J.A. § 14(a) (1968). The commissioner's note to § 14 of the UCCJA states that a "prior court has jurisdiction to modify under this section . . . as long as it would have jurisdiction *now*, that is, at the time of the petition for modification." U.C.C.J.A. § 14 commissioner's note (1979) (emphasis in original).

100. 366 N.W.2d at 480-81; *see* 28 U.S.C. §§ 1738A(a), (c)(2) (1982). If a state did not have jurisdiction to render the initial decree under jurisdictional prerequisites consistent with the PKPA, that initial decree would not be entitled to full faith and credit. 28 U.S.C. §§ 1738A(a) (1982). For a discussion of whether a state has jurisdiction to render an initial decree pursuant to the PKPA, see *supra* notes 35, 37-41, and accompanying text.

101. 366 N.W.2d at 481. In order to retain continuing jurisdiction to modify custody decrees, the PKPA requires initially that a court have jurisdiction "under the law of such State." *See* 28 U.S.C. § 1738A(d) (1982). Justice Meschke concluded that PKPA requirement does not require a state to have jurisdiction under its UCCJA. 366 N.W.2d at 478 n.2, 481 (by implication); *see supra* note 44. Rather, if any state law permitted the exercise of jurisdiction over a custody matter, this element of continuing jurisdiction would be met. *Id.* Noting that § 14-05-22 of the North Dakota Century Code permits a court to modify any direction for custody resulting from a divorce action, Justice Meschke concluded that a North Dakota court would have jurisdiction under state law if it retained in personam jurisdiction over the parties. 366 N.W.2d at 478 n. 2, 481; *see* N.D. CENT. CODE § 14-05-22(1) (1981).

A state may exercise in personam jurisdiction over a party if the party is present in that state, or if the party has sufficient contacts with the state such that the exercise of jurisdiction over him does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v.

suggested by Justice Meschke, a state may retain continuing jurisdiction to modify a custody decree even in situations in which the UCCJA would not permit assumption of jurisdiction to issue an initial decree.[102]

Justice Meschke concluded that it was unnecessary for the trial court to engage in further jurisdictional analysis on remand.[103] Because it was the home state of the children at that time, North Dakota had jurisdiction under the UCCJA to render the initial decree.[104] Additionally, because Earl remained a resident of North Dakota and the children returned to the state pursuant to his visitation rights, North Dakota has in personam jurisdiction over the parties.[105] Thus, according to Justice Meschke, the trial court has jurisdiction to modify the original custody decree.[106]

Because no opinion was endorsed by a majority of the court in *Dennis*,[107] the precedental value of the decision is uncertain. Agreement among three of the five justices indicates that future cases involving questions of whether a trial court has "jurisdiction

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Washington, 326 U.S. 310, 316 (1945). *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 2.14 to 2.21 (3d ed. 1985). Justice Meschke found that both Earl and Renae had sufficient contacts to permit the assumption of in personam jurisdiction. 366 N.W.2d at 481 n. 13. Justice Meschke stated as follows:

> [E]ach summer,[Earl] has either provided transportation for or gone to Iowa to pick up his two small children . . . to bring them back to North Dakota for the ten day visitation period in 1982 and in 1983 and the 20 day visitation period in 1984. His motion sought to expand his visitation rights with these small children to the three summer months and additionally to obtain visitation during part of other times that they are in the State when the mother returns to visit her relatives in Stanley, North Dakota. The father paid the expenses for the mother to fly back with the children in 1982 and paid her travel expenses to drive the children to North Dakota in 1983.

Id.

102. *See supra* note 44. Justice Meschke noted, however, that relying on significant connections jurisdiction would yield the same result in some cases as would applying the methodology he advocated. 366 N.W.2d at 480.

103. 366 N.W.2d at 482.

104. *Id.* at 481. For a discussion of whether a state, as the home state of the children involved, has jurisdiction to render an initial custody decree, see *supra* note 5.

105. *See supra* note 101.

106. 366 N.W.2d at 482. Justice Meschke noted that the trial court may, however, "consider the mother's motion asking it to exercise its discretion, under the 'most convenient forum' provisions of the U.C.C.J.A. and P.K.P.A., to transfer the proceeding to Iowa." *Id.* (footnotes omitted); *see* 28 U.S.C. § 1738A(c)(2)(D)(i) (1982) (state may, pursuant to PKPA, decline to exercise jurisdiction on the ground that another state is the more appropriate forum to determine custody); U.C.C.J.A. § 3(a)(4)(i) (1968) (state may, pursuant to UCCJA, decline to exercise jurisdiction on the ground that another state is the more appropriate forum to determine custody).

107. *See supra* notes 84-86 and accompanying text. In *Dennis* all justices agreed that Earl's modification request should not have been denied solely because Iowa had become the children's home state, that the PKPA provisions governing continuing jurisdiction controlled, and that Earl's continued residence in North Dakota satisfied the first of the PKPA provisions. 366 N.W.2d at 476-81; *see also supra* notes 84-85 and accompanying text. However, a majority of the court failed to agree upon the methodology to be employed in determining whether a state had jurisdiction pursuant to its own law, and hence the court did not agree upon how the second PKPA provision may be satisfied. *Compare* 366 N.W.2d at 476 *with id.* at 477 *and id.* at 480-81. *See also supra* note 86 and accompanying text. For a discussion of the second PKPA provision, see *supra* note 44. For a discussion of the various approaches of the justices in *Dennis* concerning the methodology for determining whether a state has jurisdiction pursuant to its own laws, see *supra* notes 87-102 and accompanying text.

pursuant to state law'' — a necessary factor in retaining continuing jurisdiction — will be resolved by applying the North Dakota UCCJA to the facts at the time of the petition for modification.[108]

If the children have acquired a new home state, the court should generally consider the ''significant connections'' alternative for the exercise of jurisdiction under the UCCJA.[109] Yet, it remains uncertain what connections will be considered sufficiently ''significant'' and what evidence will be sufficiently ''substantial'' to permit the exercise of significant connections jurisdiction.[110] Because the initial custody determination was made in the rendering state, and because the court files are therefore available there, the court may determine that substantial evidence is available in the rendering state.[111] Additionally, the fact that the noncustodial contestant will likely have visitation privileges in the rendering state may be deemed a significant connection between the child and that state.[112] Hence, a rendering court may retain continuing jurisdiction as long as a contestant remains in that state and visitation occurs there.

It does appear clear from *Dennis* that a rendering state will not lose jurisdiction over its custody decrees whenever the child has acquired a new home state.[113] Because a majority of the court agreed that jurisdiction may continue after the child has left the state, and that modification jurisdiction exists under state law if facts exist at the time of the petition for modification sufficient to

108. *See* 366 N.W.2d at 476, 477. *Contra id.* at 480-81 (Meschke, J., concurring) (determining whether there are sufficient connections to permit assumption of jurisdiction at the time of the petition for modification is inconsistent with the objectives underlying the PKPA).

109. *See* U.C.C.J.A. § 3(a) (1968) (alternatives of the UCCJA pursuant to which a state may exercise jurisdiction in child custody matters). If a state is the home state of a child, another state may exercise jurisdiction pursuant to the UCCJA only if there are significant connections between the child and the latter state, or if an emergency arises while the child is physically present in that state. *See id.* For a discussion of whether the UCCJA permits the exercise of jurisdiction in a child custody matter, see *supra* notes 17, 23-29, and accompanying text.

110. *See* 366 N.W.2d at 477. The district court denied Earl's request for modification solely on the grounds that Iowa was the children's home state, and thus did not consider whether jurisdiction could be based on the connections between the children and the state. *See id.* at 475, 477. As a result, Justices Erickstad, Gierke, and VandeWalle wished to remand the case to the trial court, and did not discuss the sufficiency of the connections or evidence available in North Dakota. *See id.* at 477.

111. *See, e.g.*, McAtee v. McAtee, 323 S.E.2d 611, 615 (W. Va. 1984) (the record clearly indicates that the evidence necessary for determination of custody will come from the state where the parties resided at the time of the divorce, and not from the state where the child and custodial parent had since moved). *But see, e.g.*, Hache v. Riley, 186 N.J. Super. 119, ____, 451 A.2d 971, 973 (Ch. Div. 1982) (evidence necessary for determination of custody issues is concentrated not in the rendering state, but in the state where child currently resides, attends school, has friends and companions, and has been cared for by maternal grandparents).

112. *See, e.g., Dennis,* 366 N.W.2d at 477-78 (VandeWalle, J., concurring specially) (state in which visitation will take place is in the best position to determine whether visitation should be modified); *see also* N.D. CENT. CODE § 14-05-22 (1981) (court shall grant such visitation rights as will enable child and noncustodial parent to maintain a parent-child relationship that will be beneficial to the child unless visitation is likely to endanger the child's physical or emotional health).

113. 366 N.W.2d at 477-78. In *Dennis* all justices agreed that Earl's modification request should not have been denied solely because Iowa had become the children's home state. *Id.*

permit the assumption of jurisdiction under the UCCJA, *Dennis* indicates that North Dakota will now become one of the few states to determine continuing jurisdiction consistently with the intention of the PKPA and the UCCJA.[114]

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114. For a discussion of the intention of the UCCJA and the PKPA to permit the exercise of continuing jurisdiction despite the fact that the child acquires a new home state, see *supra* note 62. For a discussion of the intention of the UCCJA that continuing jurisdiction must be determined by analyzing the facts existing at the time of the petition for modification, see *supra* note 99.